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Case No. 91-906

IN THE SUPREME COURT OF THE UNITED STATES
October Term 1991

JAMES SAFFLE, WARDEN, and
GARY MAYNARD, DIRECTOR,
OKLAHOMA DEPARTMENT OF CORRECTIONS,
Petitioners,

v.

MARK ROY LILES,
Respondent

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

William J. Mertens*
Swidler & Berlin, Chartered
3000 K Street, N.W.
Suite 300
Washington, D.C. 20007-3851
(202) 944-4372

Patti Palmer
Oklahoma Indigent Defense System
303 East Comanche
Norman, Oklahoma 73069
(405) 329-4222

Attorneys for Respondent

*Counsel of Record

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STATEMENT OF THE CASE

The respondent, Mark Roy Liles, was convicted of murder and sentenced to die in the District Court of Oklahoma County, of the State of Oklahoma, Seventh Judicial District, in case number CRF-82-4268. Judgment and Sentence were entered, and a death warrant was issued July 11, 1983. After exhausting his state remedies through a direct appeal and two applications for post-conviction relief in state court, Mr. Liles on December 29, 1989, filed a petition for habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court for the Western District of Oklahoma (case no. CIV-89-2271-W). Without objection, Mr. Liles submitted extensive evidence demonstrating that Mr. Liles's mental state would have been a significant factor at both stages of his trial in the state court. Petitioners Saffle and Maynard did not object to the District Court's receipt of this evidence, and they did not offer any controverting evidence of their own.

On November 7, 1990, the Honorable Lee R. West granted summary judgment for Mr. Liles and issued the writ of habeas corpus on the ground that Mr. Liles's rights under Ake v. Oklahoma, 470 U.S. 68 (1985), were violated when he was denied expert psychiatric assistance to aid in his defense. Judge West held that the uncontested evidence showed that Mr. Liles's due process and equal protection rights had been violated. Petitioners Saffle and Maynard appealed to the United States Court of Appeals for the

Tenth Circuit, which, on September 16, 1991, affirmed Judge West's judgment in all respects.[1]

The petitioners are now requesting a writ of certiorari to review the judgment of the Court of Appeals.

REASONS FOR DENYING CERTIORARI

This case is unsuitable for review by certiorari. The decision of the United States Court of Appeals for the Tenth Circuit was a straight-forward application of this Court's eight-to-one decision in Ake v. Oklahoma, 470 U.S. 68 (1985).[2] There was overwhelming evidence before the District Court -- all of it received without objection, and none of it controverted -- that Mr. Liles's mental health and his sanity were in issue, at both the guilt-innocence and the punishment stages of Mr. Liles's trial.

The Tenth Circuit's decision broke no new ground. It was based on the particular facts of this case. Like Ake himself, Mr. Liles was prosecuted in the courts of the State of Oklahoma for murder and was sentenced to death, at a time when the State of Oklahoma refused to provide any funds to indigent defendants for expert psychiatric assistance before or during trial, no matter how

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[1]On December 2, 1991, the Court of Appeals issued an order recalling its mandate and staying that mandate "until December 15, 1991, pending application to the Supreme Court for certiorari." The mandate of the Court of Appeals required the State to make its election within 90 days of that court's decision whether to retry Mr. Liles.

[2]Seven Justices joined Justice Marshall's opinion for the Court. Chief Justice Burger concurred in the judgment, stressing the unique need for fairness in capital cases. Then-Justice Rehnquist dissented.

compelling the need.[3] Mr. Liles, an indigent, requested such funds before trial so that he could defend on grounds of insanity and defend against the death penalty, but no funds were provided.

The Court of Appeals, affirming the decision of the District Court, held under the standards of Ake that the evidence proved that Mr. Liles's mental health was likely to be a significant factor at both his trial and his sentencing. Consequently, the Court of Appeals found that Mr. Liles's federal constitutional rights had been violated. The court held that the State of Oklahoma was required to provide Mr. Liles a new trial and a new sentencing.

In their effort to obtain this Court's review despite these circumstances, the petitioners have distorted the decision of the Court of Appeals and omitted even mentioning the critical facts on which that decision was grounded. The petitioners also are in error to suggest that the decision below in any way conflicts with other recent lower court decisions applying Ake.

In Ake v. Oklahoma, 470 U.S. 68 (1985), the Court held that, when sufficient need is shown, the Constitution requires the states to provide funds for psychiatric experts to indigent criminal

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[3]Because Ake was decided while Mr. Liles's conviction was still on direct appeal to the Oklahoma Court of Criminal Appeals and thus had not yet become final, this case presents no question of retroactivity, see Griffith v. Kentucky, 479 U.S. 314 (1987), and throughout these proceedings, the State of Oklahoma has conceded the fact that Mr. Liles is entitled to the full benefit of the Ake ruling. The State's repeated references in its petition, beginning with its statement of the question presented, to the fact that Mr. Liles's trial "occurred before the decision in Ake was handed down," see Petition, at i, 10, 17, is simply mystifying.

defendants in death penalty cases. Ake set aside the long-standing practice and policy in Oklahoma -- which prevailed at Mr. Liles's trial -- never to provide such funds, no matter how compelling the need.

This Court in Ake reaffirmed and enforced the basic tenet of our criminal justice system that:

> [F]undamental fairness entitles indigent defendants to "an adequate opportunity to present their claims fairly within the adversary system."

Id. at 77 (quoting Ross v. Moffitt, 417 U.S. 600, 612 (1974)). Thus the Constitution requires that an indigent defendant be provided with "the 'basic tools of an adequate defense.'" Id. (quoting Britt v. North Carolina, 404 U.S. 226, 227 (1971)).

So that he can have an "adequate opportunity" to defend, and can be possessed of the "basic tools of an adequate defense," an indigent defendant must be provided funds for expert assistance on mental health issues, when the defendant's mental state is likely to be a "significant factor" in his defense. The Court's opinion explained:

> When the defendant is able to make an ex parte threshold showing to the trial court that his sanity is likely to be a significant factor in his defense, the need for the assistance of a psychiatrist is readily apparent. It is in such cases that a defense may be devastated by the absence of a psychiatric examination and testimony; with such assistance, the defendant might have a reasonable chance of success. In such a circumstance, where the potential accuracy of the jury's determination is so dramatically enhanced, and where the interests of the individual and the State in an accurate proceeding are substantial, the State's interest in its fisc must yield.

. . . .

> We therefore hold that when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense.

Id. at 82-83.

Moreover, this right to psychiatric assistance extends to sentencing proceedings in death penalty cases. Those critically important proceedings must be fundamentally fair:

> We have repeatedly recognized the defendant's compelling interest in fair adjudication at the sentencing phase of a capital case.

Id. at 83. Finding that Ake had been denied his federal constitutional right to independent psychiatric assistance at both stages of his case -- the "guilt-innocence" stage and the penalty stage -- the Court reversed his conviction and sentence. Id. at 86-87.

In the decision below, the Court of Appeals and the District Court merely applied Ake to the particular facts of this case. The petitioners have tried to tar the lower court's decision as an illegitimate or extreme extension of Ake, but the petitioners have misrepresented the lower court's holding, and they have ignored the facts on which that holding was based.

1. The Tenth Circuit Did Not Require Funds For a Mental Health Expert "Merely on an Assertion that Such an Expert Would Be Beneficial and Could Possibly Provide Assistance."

The petitioners represent that the Court of Appeals held in this case that funds must be provided for a defense expert on mental health issues "merely on an assertion that such an expert would be beneficial and could possibly provide assistance," Petition, at 23, or "in any criminal case in which an expert could possibly be beneficial to the defense." Id. at 10.

In fact, the Tenth Circuit expressly rejected the very proposition that the petitioners attribute to it. The lower court's opinion could not be clearer. The court stated:

> General allegations supporting a request for court appointment of a psychiatric expert, without substantive supporting facts, and undeveloped assertions that psychiatric assistance would be beneficial to the defendant will not suffice to require the appointment of a psychiatrist to aid in the preparation of a criminal defense.

App., at 9.[4]

The lower court's opinion proceeded to review in detail the "substantive supporting facts" that had been received without objection in the District Court. This evidence included: findings and orders of the state trial court showing that Mr. Liles's mental stability was questionable, id. at 11-13; a letter of the chief

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[4]The District Court's opinion likewise found: "The record demonstrates that [Mr. Liles's] request for funds was not based on general allegations of need." The court concluded that the extensive evidence in the case, "particularly the records from Eastern State Hospital[,] clearly evince[d] the need for the assistance of a psychiatric expert." App., at 82.

forensic psychiatrist at Eastern State Hospital, where Mr. Liles was confined, attesting to Mr. Liles's enduring need for Thorazine, a powerful anti-psychotic medication, id. at 13-15; records showing the anti-psychotic medication that Mr. Liles continued to receive while awaiting trial in jail, id. at 15; Mr. Liles's behavior and treatment, as reflected in the Eastern State Hospital records, during his hospitalization there, id. at 17-19; diagnoses of depression and of suicidal tendencies in the hospital records, id. at 19-20; reports of Mr. Liles's possession "by a 'violent alter ego' named Rock," id. at 20; Mr. Liles's diagnosis at the hospital "as having a dysthymic personality disorder and an intermittent explosive disorder," id. at 21; results of a neuropsychological evaluation that Mr. Liles's explosive behavior was consistent with organic brain impairment, possibly the product of trauma, id. at 21-24; the affidavit of Russell R. Monroe, M.D., professor of psychiatry at the University of Maryland School of Medicine, corroborating these results and concluding that there is a "'significant possibility that if [respondent Liles] indeed killed Mr. Yarbrough, he did so as a result of a brain disorder that produced a seizure-like event,'" id. at 25; the conclusion of Lance A. Portnoff, Ph.D., consulting neuropsychologist at Eastern State Hospital, that Mr. Liles was not competent for trial, id. at 25-26; and evidence from Mr. Liles's earlier life concerning head injury,

physical and sexual abuse, psychological problems and treatment, and episodes of explosive and bizarre behavior. Id. at 27-30.[5]

Only after its detailed review of this voluminous evidence, the Court of Appeals concluded:

> In light of [respondent Liles's] history of mental problems, his treatment with antipsychotic medication, and the conflicting diagnoses of his incompetency and his mental condition in general, this record sufficiently supports the district court's determination that [Mr. Liles] could have made a sufficient showing under Ake, that his sanity was likely "to be a significant factor at trial."

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[5]The certiorari petition contends that "[t]he Tenth Circuit wrongly considered" some of the evidence that respondent Liles presented, namely Dr. Monroe's affidavit, and affidavits concerning Mr. Liles's upbringing and life history. Petition, at 18. It is sufficient answer that never before in these proceedings -- neither in the District Court nor in the Court of Appeals -- did petitioners Saffle and Maynard object to the courts' consideration of this evidence. Any objection made for the first time in a certiorari petition comes too late. E.g., EEOC v. Federal Labor Relations Authority, 476 U.S. 16, 24 (1986); see Rules--§ 2254 Cases, Rule 7(c); F.R.Civ.P. 46.

The petitioners also mischaracterize the hospital records that they concede the lower courts properly considered. According to the petition, those records "clearly indicated that the defendant, though perhaps mentally disturbed, was competent to stand trial, and was legally sane." Petition, at 18-19. The opinions of the Court of Appeals and the District Court explain, to the contrary, that the hospital records are replete with findings and suggestions that Mr. Liles was incompetent to stand trial and could behave explosively during a seizure-like state, because of an organic brain impairment. See App., at 19-24, 25-27, 61-70. To be sure, the chief forensic psychiatrist reported to the court that Mr. Liles was competent to stand trial, but he never disputed the organic origins of Liles's explosive behavior, and a number of hospital entries contradict his competency finding. Moreover, to be entitled to expert funds, a defendant does not need to carry the burden of proving that an insanity defense is unanimously supported by expert opinion and will succeed, or that he will in fact avoid the death penalty because of uncontested evidence of mental impairment. What Ake guarantees is the tools necessary for an adequate defense, and this right does not evaporate merely because the state, at trial, might have some basis to contest that defense.

Id. at 31 (quoting Cartwright v. Maynard, 802 F.2d 1203, 1212 (10th Cir. 1985), rev'd on other grounds, 822 F.2d 1477 (10th Cir. 1987) (en banc), aff'd, 486 U.S. 356 (1988)).

There is no basis whatever for the petitioners' statement that the Court of Appeals found Ake to be triggered "merely on an assertion that [a mental health] expert would be beneficial and could possibly provide assistance." Petition, at 23. The Court of Appeals found that Ake was triggered because, among other reasons, there was extensive, unchallenged documentation of Mr. Liles's mental illness and organic impairment. The evidence raised the distinct possibility that the killing for which Mr. Liles was convicted was the product of a seizure-like event, due to organic brain impairment. The evidence also showed that Mr. Liles had been diagnosed as incompetent at the time of his release from Eastern State Hospital. When the state denied Mr. Liles any funds for expert assistance at his trial, it deprived him of the tools essential to his defense.

2. The Tenth Circuit's Decision Does Not "Make[] a Mental Health Expert an Integral Part of Every Criminal Trial Which Involves a Crime Requiring Specific Intent."

Equally unfounded is the petitioners' description of the decision below as "mak[ing] a mental health expert an integral part of every criminal trial which involves a crime requiring specific intent." Petition, at 11.

First, as has just been stated, the foundation for the decision below was extensive evidence that Mr. Liles suffers from

mental and organic problems that could have led to the killing of Mr. Yarbrough, or that could lessen the punishment that Mr. Liles might deserve for that killing. Nothing in the lower court's opinion requires that funds must be provided where no similar evidence of mental illness is presented.

Beyond this, the petitioners ignore the fact that respondent Liles attempted to raise the insanity defense, not merely negate a specific intent element of the crime, but the state's refusal to provide funds thwarted this effort. Defense counsel's pre-trial request for funds specifically stated that a psychiatrist or psychologist was necessary to develop an insanity defense. The motion requesting funds asserted that there was "reason to believe that [respondent Liles] suffers from mental disease or defect, that would affect his capacity to appreciate the wrongfulness of his conduct or conform his [conduct to the] requirements [of the] law." App., at 32. Further, the motion averred that an expert was necessary because "there is a need to determine whether [respondent Liles] had the ability to distinguish right from wrong," an issue that "is relevant and material in determining guilt." Id.

The evidence that the District Court considered, and the Court of Appeals reviewed, incontestably shows that, with expert assistance, respondent Liles might have defended successfully on grounds of insanity. The evidence raises the possibility that at the time of the killing, Mr. Liles was "possessed by a 'violent alter ego' named Rock." App., at 20. The evidence also raises the possibility that Mr. Liles's conduct was the product of a "seizure-

like event," which resulted in violent behavior "over which [respondent Liles] lack[ed] control, and which [was] not in any ordinary sense intentional.'" Id. at 24.

Yet again, the petitioners also ignore the Tenth Circuit's own words. The court found that expert assistance was required, because an expert was necessary "to assist the defense in determining whether an insanity defense [was] viable or warranted under the circumstances . . . ." Id. at 33 (emphasis supplied).

On this issue also, petitioners Saffle and Maynard have misstated what the Tenth Circuit actually held, and have ignored the evidentiary basis for its holding.

3. The Tenth Circuit Did Not Require Appointment of a Mental Health Expert "Any Time the Aggravating Circumstance of Continuing Threat to Society Is Alleged."

Further mischaracterizing the decision below, petitioners Saffle and Maynard contend that the Court of Appeals has held that Ake's requirements are triggered "any time the aggravating circumstance of continuing threat to society is alleged," and "in all cases where continuing threat to society is alleged . . . ." Petition, at 13.

Yet again, the petitioners have ignored the actual basis for the lower court's holding. The lower court's opinion emphasized two factors: that the prosecutor explicitly placed Mr. Liles's mental state in issue; and that the evidence in this particular case showed that Mr. Liles had been denied the tools that were necessary to a fair defense. The Court of Appeals explained:

> In this case, because the state presented evidence concerning [respondent Liles's] future dangerousness, albeit not psychiatric evidence, and because [respondent Liles] established the likelihood that his mental condition could have been a significant mitigating factor, the district court correctly determined that the state trial court deprived [respondent] of due process by denying him court-appointed psychiatric assistance at the sentencing phase of his trial.

Id. at 37 (emphasis supplied).[6]

4. The Tenth Circuit's Decision Is Not in Conflict With Any Other Decision Cited in the State's Petition.

The certiorari petition suggests that the decision below marks a departure from the application of Ake in other recent decisions, and creates a conflict among the lower courts. Petition, at 15-17, 21-22. Yet the Court of Appeals in this case hewed to Ake's specific holding, and created no conflict at all. Petitioners Saffle and Maynard cite principally four cases: Harris v. Vasquez, 943 F.2d 930 (9th Cir. 1991); Christenson v. State, 261 Ga. 80, 402 S.E.2d 41, cert. denied, 112 S. Ct. 166 (1991); State v. Roper, 328 N.C. 337, 402 S.E.2d 600, cert. denied, 112 S. Ct. 280 (1991); and State v. Owens, 248 Kan. 273, 807 P.2d 101 (1991).

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[6]Likewise, the District Court based its holding that respondent was entitled to expert assistance at the second (sentencing) stage of the state court proceedings on two particular circumstances. First, the prosecutor explicitly made Mr. Liles's mental state relevant to his punishment. App., at 84-85 & n.16. Second, the facts showed that "the mental state of the defendant [was] a significant factor in the penalty phase" of Mr. Liles's trial. App., at 87.

The decision of the Court of Appeals in the present case does not conflict with any of these four decisions. In suggesting that there is a conflict, the petitioners yet again ignore what the Court of Appeals has actually held, and they overlook the facts on which that holding was actually based.

In Harris v. Vasquez, supra, the Ninth Circuit considered Harris's claim that his rights under Ake were violated, despite the fact that Harris was provided funds to hire, and did hire, two defense psychiatrists before his trial. Harris nonetheless maintained that he was entitled to habeas corpus relief, on the asserted ground "that his two defense psychiatrists incompetently performed their evaluations of him." 943 F.2d at 930. The Ninth Circuit rejected this claim, saying:

> Under Ake, the state must provide an indigent defendant with access to psychiatric assistance at the guilt phase of a trial, when the defendant has demonstrated that his sanity at the time of the offense is likely to be a significant factor in determining guilt. [Ake v. Oklahoma, 470 U.S. at 83.]
>
> Harris's Ake claim to psychiatric assistance at the guilt phase fails because the state did in fact provide Harris with psychiatric assistance. The state provided Harris with access to any competent psychiatrist of his choice when it gave Harris the funds to hire two psychiatrists from the general psychiatric community. The state did not limit Harris's access to psychiatric assistance in any way.

Id. at 949.

There is no conflict at all between the Ninth Circuit's decision in Harris and the Tenth Circuit's decision here. Respondent Liles was denied the very right that Harris had been

provided, and which the Ninth Circuit in Harris v. Vasquez explicitly reaffirmed, namely the right to "access to psychiatric assistance . . . when the defendant has demonstrated that his sanity at the time of the offense is likely to be a significant factor in determining guilt."

Of the state cases that the petitioners cite, one, State v. Roper, supra, did not even involve a question of a defendant's entitlement to funds for a mental health expert. The defendant in that case cited Ake to argue that he should have been provided funds for a defense investigator. State v. Roper, 328 N.C. at 353, 402 S.E.2d at 609. Obviously enough, that issue raises different considerations from the factors that are relevant here. Nonetheless, the North Carolina Supreme Court reaffirmed its understanding that Ake requires the state to provide psychiatric assistance when it is shown "'either that without expert assistance [the defendant] will be deprived of a fair trial, or that there is a reasonable likelihood that it will materially assist him in the preparation of his case.'" Id. (quoting State v. Bridges, 325 N.C. 529, 532, 385 S.E.2d 337, 338 (1989)). Mr. Liles's rights under Ake were violated precisely because the denial of expert assistance deprived him of a fair trial, and because such assistance would have materially assisted him in the preparation of his case, and the Tenth Circuit correctly so held.

The petitioners' other state cases, Christenson and Owens, both stand for the unremarkable proposition that to be entitled to funds for a mental health expert, the defendant must show that his

mental health is likely to be a significant factor at trial. In Christenson, the Supreme Court of Georgia found that an Ake claim was unfounded because the defendant "presented no evidence by which the court could reasonably have inferred that the question of insanity would be a significant factor at the guilt phase of trial." Christenson v. State, 402 S.E.2d at 45, 261 Ga. at __. Nor was the defendant entitled to assistance at the penalty phase of his trial, for the evidence showed only "that the defendant is selfish and manipulative, lacks regard for the rights of others, has abused drugs and alcohol, and has committed numerous crimes. But it does not show that the defendant suffers from any serious mental disorder." Id.

In Owens, the defendant claimed before trial that he suffered amnesia and could not remember what had happened at the time of the crime. His attorney informed the trial court that a psychiatrist and sociologist already had examined Owens, and the attorney requested funds for additional testing that "could possibly retrieve Owens' memory or eliminate the possibility of feigned amnesia," but the request was denied. State v. Owens, 807 P.2d at 104, 248 Kan. at ___. On appeal of his conviction, Owens argued that the denial of funds violated his rights under Ake. The Supreme Court of Kansas affirmed. It found that "Owens has not made the threshold showing that the effect of amnesia upon his mental capacity was a significant issue for a defense to the charges." Id. at 108, 248 Kan. at ___. The reason was that Owens had admitted that he did not suffer from amnesia after all: The

pre-sentence report showed that "Owens explained to the court services officer after conviction that his failure to testify was because he was not with anyone at the time of the incident and he decided the jury would not believe him. No mention was made of amnesia." Id.

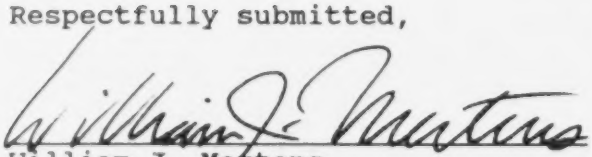
These three cases -- the Tenth Circuit's decision here, Christenson, and Owens -- together show only that three courts, applying essentially the same legal standard, have reached different results on different facts. In the present case, unlike the two state cases, there is substantial evidence that the defendant suffered from mental illness and organic brain impairment. In this case, the respondent Liles has shown that his mental state could have been a significant factor in his defense. The petitioners have shown no conflict at all between the decision below and any other decision that simply applies Ake to different facts.

CONCLUSION

Respondent, Mark Roy Liles, respectfully submits that the petition for a writ of certiorari should be denied.

Dated: December 18, 1991

Respectfully submitted,



William J. Mertens
Swidler & Berlin, Chartered
3000 K Street, N.W.
Suite 300
Washington, D.C. 20007-3851
(202) 944-4372

Patti Palmer
Oklahoma Indigent Defense System
303 East Comanche
Norman, Oklahoma 23069
(405) 329-4222

Attorneys for Respondent